**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.**

**JUDGMENT**

L.Rs. of late Bheru Lal vs. Mohammad Ibrahim

S.B.Civil Second Appeal No.108/1981 against the judgment and decree dated 14.1.1981 passed by Additional District Judge, Udaipur in Civil appeal No.41/1975.

Date of Judgment: January 17,2006.

**PRESENT**
**HON'BLE MR. PRAKASH TATIA,J.**

Mr.A.K. Rajvanshy for the appellant.
Mr.D.R. Bhandari for the respondents.

**BY THE COURT:**

**REPORTABLE**

Heard learned counsel for the parties.

Brief facts leading to filing of this suit for redemption of the mortgaged shop are that originally the property was belonging to one Laluji Soni. He had three sons, Suraj Mal, Bal Mukund and Laxmi Lal. Bal Mukund and Laxmi Lal both died before the year 1956. Suraj Mal had one son and wife, Jagannath and Lehri Bai. Suraj Mal also died long ago and it is alleged that Suraj Mal's wife contacted second marriage (*Nata*) . It is alleged that Bal Mukund, Laxmi Lal and Jagannath constituted the coparcenery after the death of Laluji Soni. Bal Mukund mortgaged the shop in dispute to Narayan s/o Fateh Lal, Heera Lal and Jiwan Lal Sethi

for a consideration of Rs.3000/- on 30.1.1944. It is alleged that the said mortgage was created with the consent of Laxmi Lal and Jagannath. The possession was delivered to the mortgagees. The mortgagee Narayan expired and the remaining mortgagees transferred their mortgage's rights to the defendant for a consideration of Rs.2000/- by registered deed dated 21.2.1961 and handed over possession of the shop to the defendant, therefore, the defendant stood in the shoes of the mortgagees. It is alleged that Bal Mukund and Laxmi Lal both expired before coming into force of Hindu SuccessionAct 1956 and their wives contracted second marriage (*Nata)*, therefore, Jagannath succeeded to the property as sole owner. It is alleged that Jagannath was of unsound mind and he was living in the guardianship of his wife Smt. Lehri Bai and according to the plaintiff, Smt. Lehri Bai is the de-facto guardian of Jagannath. Because of the need, the shop in dispute was sold by Smt.Lehri Bai as de-facto guardian of Jagannath to the plaintiff by registered sale-deed dated 19.1.1971 for a consideration of Rs.5000/-. Thereby, the plaintiff became the owner of the shop in dispute and stepped in the shoes of the mortgagor. The plaintiff, after serving notice upon the defendant dated 24.1.1971, filed this suit for redemption of the mortgage shop on 16.2.1971.

The defendant contested the suit after admitting the ownership of Laluji Soni for the shop in dispute. The defendant submitted that the

complete pedigree has not been given by the plaintiff. The defendant submitted that Laluji had four sons, Suraj Mal, Bal Mukund, Laxmi Lal and one Gehri Lal. Gehri Lal went in adoption. Bal Mukund had three daughters, Bhanwari, Manohari and Kamla. According to the defendant, the property of Laluji was partitioned between the sons of the Laluji in the life time of Laluji himself and all the sons started living in their separate houses with their separate kitchens. Jagannath sold his property for a consideration of Rs.1800/- to Bal Mukund on 12.2.1944 wherein Jagannath himself mentioned that by this sale-deed he is selling the property which had come in his share. Therefore, it is evident that properties of Laluji were partitioned before 1944. It is also alleged that in the registered document, said Jagannath and Laxmi Lal put their signatures as attesting witnesses which shows that the property between co-sharers of the deceased Laluji was partitioned and this fact was not disputed by any body. The defendant also pleaded that after the death of Bal Mukund, her daughters became the owners of the property and they executed sale-deed for the shop in dispute in favour of the defendant on 11.2.1971. The defendant also submitted that Jagannath was never idiot or of unsound mind nor Smt. Lehri Bai acted as de-facto guardian of Jagannath, therefore, Smt. Lehri Bai had no right to transfer the mortgage property in favour of the plaintiff because firstly, Jagannath himself sold the property to Bal Mukund which came in the share of

Jagannath upon partition of the property and secondly, even after death of Bal Mukund, the property devolved upon Bal Mukund's daughters and not upon Jagannath.

The plaintiff submitted rejoinder to the written statement of the defendant and took a plea that though the sale-deed was executed by Jagannath in favour of Bal Mukund on 16.2.1944 but that sale-deed was a sham transaction. The defendant also challenged the sale-deed on the ground that Jagannath was an idiot man. He was living like a foolish person and he used to drink too much and was bent upon to destroy the property. Therefore, the sale-deed was got executed from Jagannath in favour of Bal Mukund so that the property may be saved. It is submitted that the document was never intended to be acted upon. It is also submitted that the daughters of Bal Mukund executed a deed on 13.12.1961 admitting that the property belongs to Jagannath and they had no share in the property in dispute. In rejoinder, it is also submitted that the defendant claimed that he purchased the disputed property from one of the daughters of Bal Mukund, therefore, the defendant has no right to dispute the written admission of the Bal Mukand's daughters dated 13.12.1961 wherein they admitted that the property belonged to Jagannath and neither Bal Mukand nor they have share in the property.

The issues were framed and both the parties led their evidence, documentary as well as oral. The trial court by the judgment and decree

dated 16.11.1974 held that Bal Mukund and Laxmi Lal died before the year 1956. The property of Laluji was partitioned before that. The sale of the property by Jagannath in favour by Bal Mukund by registered sale-deed dated 16.2.1944 is not a sham transaction. Jagannath had no right or title in the property after its sale to Bal Mukund and consequently, Jagannath's wife Smt. Lehri Bai could not have sold the property to the plaintiff on 19.1.1971. The trial court after appreciation of the oral evidence held that Jagannath's mental state was not good and Smt. Lehri Bai was looking after Jagannath. However, the trial court observed that the medical certificate produced by the plaintiff has not been proved by calling the doctor in the witness-box, but by oral evidence, the plaintiff succeeded in proving that Jagannath was not of sound mind. But this finding is no consequence because the property in dispute was sold by Jagannath long ago in the year 1944 and obvious reason is that it was not the case of any party that Jagannath was of unsound mind in the year 1944. The trial court, therefore, dismissed the suit of the plaintiff by judgment and decree dated 16.11.1974.

The plaintiff being aggrieved against the judgment and decree of the trial court, preferred first appeal. In the first appeal, an application under Order 41 Rule 27, C.P.C. was submitted by the appellant-plaintiff and the appellant-plaintiff sought permission to produce and prove the

sale-deed dated 12.5.1963 which was executed by Smt.Lehri Bai and which was relevant for the purpose for deciding issues no.4,6 and 7. The first appellate court allowed the said application by order dated 3.7.1978 and remitted the matter back to the trial court for recording the evidence regarding sale-deed dated 12.5.1963.

After receipt of the evidence from trial court, the first appellate court decided the appeal and , held that the sale-deed(Ex.A.1) in favour of Bal Mukund is a sham and bogus document and it does not record the true intention of the parties and it was executed only to safeguard the property as there was fear of Jagannath's waisting it. The first appellate court also held that no partition took place between the sons of Laluji. The first appellate court reversed the finding on issue no.1 and 5 to 8, however, while deciding issue no.2 about the unsoundness of mind of Jagannath, the first appellate court held that Jagannath may not have normal mental equilibrium and at the same time, he cannot be said to be lunatic person or an idiot. Therefore, the sale-deed executed by Smt. Lehri Bai on behalf of Jagannath as guardian of Jagannath is without authority and, therefore, has not conveyed title of the property in favour of the plaintiff. In result, even after reversal of the finding of the trial court on some of the issues, the appeal of the appellant-plaintiff was dismissed by the first appellate court by judgment and decree dated 14.1.1981. Hence this second appeal.

This appeal was admitted on 5.8.1981 on finding the following substantial questions of law:-

> *" 1. Whether as the result of the death of Jagannath during the pendency of the appeal, his sole heir Smt. Lehri widow became the owner of the property by inheritance and as such the mortgagee has no right to challenge the transfer in view of Section 43 of the Transfer of Property Act, if so, what is its effect on the suit?*
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> *2. Whether the finding of the learned lower appellate court, which reversed the finding of the trial court, that Jagannath was not of unsound mind is based on no evidence and is perverse ?"*

According to the learned counsel for the appellant, the first appellate court committed serious error of law in not taking note of the fact that Jagannath died during the pendency of the first appeal inspite of fact that an application was submitted by the plaintiff-appellant before the first appellate court informing that Jagannath had died. According to learned counsel for the plaintiff-appellant, the first appellate court held that the partition never took place between the co-sharers of deceased Laluji, then even if Smt. Lehri Bai at the time when the property was sold by Smt. Lehri Bai she maynot had authority to sell the property on behalf of Jagannath but since she sold the property as de-facto guardian of Jagannath, then by virtue of Section 43 of the Transfer of Property Act, after the death of Jagannath, Smt. Lehri Bai herself became the owner of the property or at least got the share in the

property to the extent of share of Jagannath. Therefore, the transfer in favour of the plaintiff by Smt.Lehri Bai became valid transfer on vesting title in Smt.Lehri Bai and Section 43 of the Transfer of Property Act validated the sale made by Smt.Lehri Bai. According to the learned counsel for the appellant, since Jagannath was the last male heir in the coparcenery and the female heir had no right, title and interest in the property as two of the brothers of Jagannath died before year 1956 and Bal Mukund's daughters were married from before 1956 when the Hindu Succession Act came into force, therefore, the entire property devolved only upon Jagannath and after the death of Jagannath, it devolved upon only Smt.Lehri Bai. It is also submitted that it is a pure question of law and if that fact was not taken note by the first appellate court then this Court also can look into this aspect of the matter to grant relief to the plaintiff-appellant.

The learned counsel for the appellant vehemently submitted that the plaintiff proved by voluminous evidence that Jagannath was of unsound mind. The first appellate court also could not declare that Jagannath was man of a normal mind and in this situation, the first appellate court should not have reversed the finding of the trial court recorded about the insanity of Jagannath. The learned counsel for the appellant referred the evidence also in support of his contentions.

The learned counsel for the respondents vehemently submitted

that the plaintiff did not raise such plea of sale in favour of becoming valid due to death of Jagannath and devolution of interest of Jagannath in Smt. Lehri Bai. Therefore, the plaintiff-appellant cannot raise altogether a new plea in the second appeal. It is also submitted that the plea taken by the appellant on the basis of Section 43 of the Transfer of Property Act also involves several questions of fact, therefore, also this plea cannot be permitted to be raised in second appeal. According to the learned counsel for the respondents, admittedly, Bal Mukund's wife was alive and there is no case of the plaintiff in his plaint when Bal Mukund's wife left the house and contracted *Nata*. It is also not pleaded whether that *Nata* legally severed the relationship of the husband and wife between Bal Mukund and Bal Mukund's wife. The learned counsel for the respondent also submitted that it is admitted case that Bal Mukund's wife left the house in the year 1958 after coming into force of the Hindu Succession Act and by that time, even if she had limited right that limited right has culminated into full ownership right. It is also submitted that in view of the finding of the first appellate court, the entire property cannot devolve upon Smt.Lehri Bai. It is also submitted that the first appellate court has rightly held that the sale-deed executed by Smt.Lehri Bai was invalid. The learned counsel for the respondents further submitted that even if Jagannath was not of sound mind or he was lunatic or idiot then no sale could have been effected by Smt.Lehri Bai without obtaining prior

permission of the court. The learned counsel for the respondent also vehemently submitted that in fact the first appellate court exceeded its jurisdiction in declaring the sale-deed executed by Jagannath in favour of Bal Mukund dated 16.2.1944(Ex.A.1) as sham document as this finding is based on no evidence. The first appellate court committed serious error of law in relying upon the statement of D.W.5 Samarath Singh,Advocate who scribed sale-deed dated 16.2.1944 Ex.A.1 without appreciating this fact that how witness D.W.5 had knowledge about family status of Jagannath and his brothers and it is clear from the statement of D.W.5 himself that he only stated that he 'heard' from Jagannnath's brother that Jagannath is drunkard and may ruin the property. It is also submitted that the plaintiff did not produce any evidence to prove that the document Ex.A.1 dated 16.2.1944 is a sham document and not a single word on oath came even from Smt. Lehri Bai, wife of Jagannath, who could have been the best witness and she got opportunity to give evidence twice, one as P.W.9 and again as P.W.13.

I considered the submissions of the learned counsel for the parties and perused the record.

It will be appropriate to first consider the substantial question no.2. The trial court held that Jagannath was idiot or man of unsound mind or lunatic and his wife Smt.Lehri Bai was looking after Jagannath. This finding was reversed by the first appellate court. Firstly it is a finding

of fact and secondly, it appears from the various documents which were executed and got registered, bears the signatures of Jagannath as an attesting witness, apart from the fact that he himself executed sale-deed dated 16.2.1944(Ex.A.1) in favour of Bal Mukund. If Jagannath was not of sound mind, why his signatures were obtained on various documents, has not been explained. Apart from it, even we look into the pleadings then nothing has been stated by the plaintiff, from when Jagannath became lunatic or man of unsound mind. Be it as it may be, the plaintiff's own document Ex.9 dated 12.5.1963 is very relevant. This document was produced by the plaintiff himself. This document is a sale-deed executed by Smt.Lehri Bai in favour of Ganpat Lal. In this sale-deed of 1963, in para 6 it is mentioned that Jagannath is of unsound mind since last 12 years and Smt.Lehri Bai is looking after the said Jagannath as his guardian. The cumulative effect of this fact claiming to be unsound mind since last 12 years and the signatures of Jagannath on various registered documents of mortgage of the property and sale of the property, proves only that Jagannath was not a man of unsound mind when he executed the sale-deed dated 16.2.1944(Ex.A.1) in favour of Bal Mukund. So far as evidence about the unsound mind of Jagannath is concerned, there is only oral evidence. The plaintiff despite having the best evidence- medical certificate, did not produce the doctor to prove the lunatic state of mind of Jagannath. Without there being any specific plea and evidence about

when Jagannath became man of unsound mind and particularly in the light of several registered documents containing the signatures of Jagannath, it cannot be said that Jagannath was man of unsound mind to the extent that Smt.Lehri Bai could have executed the sale-deed on behalf of Jagannath. It is also admitted case that no permission of the court was sought before executing sale-deed in favour of the plaintiff if Jagannath was man of unsound mind. Therefore, it cannot be said that the first appellate court has committed error of law or fact in reversing the finding of the trial court about unsound mind of Jagannath. Substantial questionno.2 is therefore, decided against the appellant and the finding recorded by the first appellate court is affirmed.

The next question is that what is the effect of death of Jagannath during the pendency of the first appeal. The finding of first appellate court is that the suit property remained un-partitioned. The plea of the appellant-plaintiff is that even if the sale-deed was wrongly executed by Smt. Lehri Bai as the guardian of Jagannath but because of the death of Jagannath after the execution of sale-deed by Smt. Lehri Bai she acquired the share in the property if not entire property, Section 43 of the Transfer of Property Act of 1882, validates the sale which was invalid for want of title in the executant at the time of execution of sale-deed. Section 43 of the Act of 1882 which provides that where a person fraudulently or erroneously represents that he is authorised to transfer

certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Therefore, according to the learned counsel for the appellant, Smt. Lehri Bai who sold the property erroneously or even fraudulently and subsequently she got share in the property that share in the property stands transferred in favour of the plaintiff as sale-deed became valid in view of Section 43 of the Transfer of Property Act, 1882.

It appears from the record of the first appellate court that before the first appellate court, an application was submitted on 23.4.1979 that Jagannath died on 7.2.1979 and Jagannath left behind only Smt.Lehri Bai but apart from this information, nothing was done by the appellant-plaintiff so as to claim any right on the basis of the plea which appellant wants to take now in second appeal. The learned counsel for the respondent vehemently submitted that the respondent can challenge the finding which has been recorded by the first appellate court against the respondent-defendant in the second appeal preferred by the appellant-plaintiff. According to the learned counsel for the respondent, to appreciate the effect of Section 43 of the Transfer of Property Act, it will be necessary to re-examine the issue about Ex.A.1 by which Jagannath transferred his entire share in favour of Bal Mukund. The first appellate

court committed serious error of law in holding Ex.A.1 as sham document and said finding has been recorded without there being iota of evidence from the plaintiff. It is also submitted that a statement of defendant's witness DW-5-who was scribe of Ex.A.1 sale-deed and who did not disclose his source of knowledge for knowking family status of parties for whom he acted, is of no consequence, particularly when the advocate gave his statement against the interest for whom he appeared as witness. The best witness Lehri Bai, the wife of Jagannath herself did not state a single word on oath that Ex.A.1 was executed to save the family property as Jagannath was drunkard or he would have destroyed the property. It is also submitted that no evidence is available on record to show that Jagannath in fact ever acted detrimental to the interest of his property or for any family property. There is no evidence to show that any necessity arose for safeguarding the property from Jagannath, rather the evidence which are on record, clearly shows that the property was always dealt with by Bal Mukund and he used to take loan from various persons at different times by mortgaging the property, therefore, in fact, not Jagannath but Bal Mukund used to borrow money, which could have been the act of acting detrimental to the interest of the joint family property.

The learned counsel for the appellant tried to support the reasons given by the courts below on sale-deed Ex.A.1 dated 16.2.1944 by saying that when defendant's own witness who was advocate admitted that

family status of the sons of Laluji was joint and he stated that Jagannath was drunkard and would have destroyed the property then the defendant-respondent cannot challenge the findings of the courts below.

It appears that to challenge document Ex.A.1 dated 16.2.1944, neither the plaintiff stated a single word nor the plaintiff's predecessor and the best witness Smt.Lehri Bai stated a single word. Admittedly, Bal Mukund used to mortgage the property before the sale-deed dated 16.2.1944 was executed and thereafter also. No act of Jagannath has been shown by which it can be gathered that said Jagannath acted detrimental to the interest of the joint family property. It appears that first appellate court felt heavily influenced by the status of the witness D.W.5 and in that influence, misread the evidence of D.W.5. D.W.5, who was Advocate in his examination-in-chief, stated that he is scribe of the sale-deed Ex.A.1. He clearly stated that the sale-deed was written as stated by Jagannath. He only stated that he cannot say that Jagannath was man of idiot type. He also stated that at the time of scribing the sale-deed, there was a talk that Jagannath used to drink. He also stated that Bal Mukund stated that Jagannath will destroy the property and Bal Mukund so said in the presence of Laxmi Lal and he also stated that at that time it was also stated that sale-deed was executed but the property will remain of Jagannath. Therefore, only source of knowledge of D.W.5 is from the said statement of Bal Mukund. This statement has been given in

cross-examination, on cross-examination by the plaintiff's side. It appears that the witness was not re-cross examined by the defendant. This oral statement stands contradicted by the mortgage-deed Ex.8 dated 17.6.1944 executed by Bal Mukund which shows that the property was mortgaged by Bal Mukund. The property was not only sold to Bal Mukund but in fact he exercised his power as owner of the property by mortgaging the property by registered deed and clearly mentioned in the mortgage deed dated 30.11.1944 itself that he is mortgaging the property which he has purchased. The first appellate court also failed to appreciate the fact that Bal Mukund used to deal with the property and mortgaged on several occasions without objection of Laxmi Lal and Jagannath and in fact they became the attesting witness in the transaction. In these circumstances, when there was no evidence from the plaintiff and the statement of D.W.5 is not coming directly from his own knowledge, the first appellate court committed serious error of law in declaring Ex.A.1 as sham document and wrongly declared that the document was executed with no intention to be acted upon by ignoring the fact that the property was mortgaged by the transferee Bal Mukund after execution of Ex.A.1.

In view of the above, it is difficult to hold that Smt.Lehri Bai got any share in the property which was sold by Jagannath to Bal Mukund by executing sale-deed dated 16.2.1944(Ex.A.1). Consequently, when there

being no parties successors of Bal Mukund in the suit, it cannot be held that Jagannath had any share in the property at the time of his death, which was sold by him in the year 1944. At this stage we cannot ignore this important fact that the sale-deed Ex.A 1 dated 16.2.1944 was never challenged by the plaintiff or his predecessor at any time despite the fact that if contention of the plaintiff is accepted that Ex.A 1 was executed to save the property of Jagannath then the sale deed was in the knowledge of Lehri Bai and was in the knowledge of daughters of Bal Mukund from very beginning. In fact the first appellate court misread the statement of the witness D.W.5 and thereby reversed the finding of the trial court about the sale deed Ex.A 1 in favour of Bal Mukund. Therefore, in the facts of the case, the plaintiff-appellant failed to prove that after the death of Jagannath, Smt. Lehri Bai got any share in the property as the property was sold by Jagannath to Bal Mukund and, therefore, no right stood transferred in favour of the plaintiff even by aid of Section 43 of the Transfer of Property Act.

Consequently, the appeal of the appellant is dismissed. No order as to costs.

**( PRAKASH TATIA ),J.**

mlt.